Supreme Court, U.S.
FILED

(1)

03 502 SEP 29 2003

No.

IN THE

Supreme Court of the United States

TOWER INSURANCE COMPANY,

Petitioner,

v.

TRINITY EVANGELICAL CHURCH AND SCHOOL-FREISTADT,

Respondent.

On Petition for Writ Of Certiorari
To the Supreme Court of Wisconsin

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the Wisconsin Supreme Court, in direct contravention of this Court's decision in *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. __, 123 S. Ct. 1513 (2003), and fundamental principles of due process, erred by upholding a punitive damages award against Tower Insurance Company that was more than 200 times the compensatory damage award and 350 times the regulatory sanction for the same alleged conduct.

PARTIES TO THE PROCEEDING AND DESIGNATION OF CORPORATE RELATIONSHIP

Petitioner Tower Insurance Company is a wholly owned subsidiary of Peerless Indemnity Insurance Company. Peerless Indemnity Insurance Company is not a publicly traded company.

Respondent Trinity Evangelical Church and School-Freistadt is a religious establishment located in Mequon, Wisconsin.

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Petitioner Tower Insurance Company ("Tower") respectfully petitions for a writ of certiorari to review the judgment of the Wisconsin Supreme Court in this case.

OPINIONS BELOW

The opinion of the Wisconsin Court of Appeals is reported at *Trinity Evangelical Lutheran Church v. Tower Insurance Co.*, 2002 WI App 46, 641 N.W.2d 504. The opinion of the Wisconsin Supreme Court is reported at *Trinity Evangelical Lutheran Church v. Tower Insurance Co.*, 2003 WI 46, 661 N.W.2d 789.

STATEMENT OF JURISDICTION

The judgment of the Wisconsin Supreme Court was entered on May 23, 2003, and Tower Insurance Company's timely motion for reconsideration was denied on July 1, 2003. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED IN THE CASE

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

STATEMENT OF THE CASE

This case originates from a dispute about insurance coverage where two insurance companies, Tower and Utica Mutual Insurance Company ("Utica"), shared potential liability to cover an accident involving a teacher at Trinity Evangelical Lutheran Church & School Freistadt ("Trinity"). Despite this coverage dispute, Tower defended Trinity in the underlying litigation arising from the accident, reformed Trinity's insurance policy to provide coverage before Trinity had paid a penny to the injured parties, and ultimately paid $490,000 to resolve the accident-related claims.

Nonetheless, a Waukesha County, Wisconsin trial court entered summary judgment *sua sponte* against Tower for the bad faith handling of Trinity's claim, and ordered Tower to pay $17,570 in damages – the fees Trinity incurred in litigating the coverage issue. Pet. App. 65a-74a. After the entry of summary judgment on liability, the court held a trial limited to the issue of punitive damages. The jury awarded Trinity $3.5 million. After post trial motions were denied, Tower appealed the trial court's decision to the Wisconsin Court of Appeals. Explaining that the existence of material disputed facts precluded summary judgment, the Wisconsin Court of Appeals reversed the *sua sponte* summary judgment decision. Pet. App. 55a. However, the Wisconsin Court of Appeals also held that, if on remand a jury found Tower liable for bad faith, then the $3.5 million punitive damage award issued by the earlier jury should be reinstated, as it did not violate due process. Pet. App. 58a-64a. Tower appealed the decision of the Wisconsin Court of Appeals to the Wisconsin Supreme Court. The Wisconsin Supreme Court reversed in part the Court of Appeals and reinstated the bad faith summary judgment determination. Pet. App. 1a-27a. The Wisconsin Supreme Court also upheld the $3.5 million punitive damages award against Tower; the Court held that the award of 200 times compensatory damages and 350 times the

regulatory sanction for improper claims practices did not contravene the principles set forth in this Court's recent decision in *State Farm Mutual Automobile Insurance Company v. Campbell*, 538 U.S. __, 123 S. Ct. 1513 (2003). Pet. App. 13a-26a.

The Parties and Underlying Coverage Dispute

In early 1994, Trinity, a religious establishment located in Mequon, Wisconsin, solicited insurance quotations from a number of insurers including James Rodrian ("Rodrian") of Rodrian & Associates, Inc., an independent agency that sells insurance for a variety of insurers, including Tower. Following a series of meetings between Rodrian and Trinity, Rodrian sought and obtained a coverage quote from Tower.

Rodrian issued to Trinity an insurance binder dated February 10, 1994. The binder showed that non-owned and hired automobile insurance ("non-owned coverage") was included in coverage to Trinity. After issuing the binder to Trinity, but before delivering the binder to Tower, Rodrian completed an application for insurance with Tower. In the rush to put the account together, Rodrian mistakenly failed to mark the correct box to include non-owned coverage when he submitted the policy application to Tower. Thereafter, Tower issued an insurance policy to Trinity based on Rodrian's application that did not include non-owned coverage.

On January 24, 1995, Lorrie Reimer, a teacher at Trinity Lutheran School, was driving her personal car with three Trinity students when she failed to obey a stop sign and collided with Suzanne Rather. The accident resulted in injuries to Rather and her passenger.

After the accident, Trinity contacted Rodrian. Upon realizing that there was no non-owned coverage on the Trinity

policy, Rodrian wrote a letter on January 31, 1995, to Carol Blackwell, a district manager for Tower's underwriting group. Although Rodrian was covered by Utica Insurance for any errors or omissions made in the course of his business, he asked Tower to back-date Trinity's policy, explaining that: "[t]his was an honest mistake made under rushed circumstances and I'm asking if you would allow us to backdate the coverage." In a second letter to Tower on April 21, 1995, Rodrian again admitted his mistake and requested that coverage be back-dated. At this time there were no lawsuits pending against Trinity, nor had Trinity requested contract reformation.

Blackwell forwarded Rodrian's request to back-date Trinity's policy to Gene Gallagher, vice president of Tower, with a memorandum explaining the circumstances. Explaining that the underwriting file did not contain any indication that Trinity had sought non-owned coverage, Tower subsequently denied the request to back-date Trinity's coverage. At trial, Gallagher explained that he denied Rodrian's request because Rodrian alone made the mistake and because Rodrian failed to send a copy of the insurance binder to Tower within three days of issuing it to Trinity.

Trial Court Decisions

Almost three years after the accident, the injured parties sued Trinity. Tower intervened as a defendant in the underlying accident case while reserving its rights. Tower hired counsel to represent Trinity and retained separate counsel to represent Tower on the coverage issue. Tower subsequently filed a declaratory judgment action to determine its rights and obligations with respect to claims against Trinity. Tower believed that Utica would cover Trinity's loss due to agent error, and that Trinity would not be exposed to liability. Thereafter, Trinity, for the first time, filed a claim against Tower for reformation and breach of contract. When Trinity did so, Tower withdrew

its declaratory judgment action and proceeded with discovery to determine whether reformation was appropriate.

On August 10, 1998, Trinity also sued Rodrian and Utica based on Rodrian's negligence. In turn, Rodrian sued Tower to demand indemnification. Contending that Rodrian effectively admitted fault for the lack of coverage, Tower moved for summary judgment on Rodrian's indemnification cross-claim. On March 3, 1999, the trial court granted Tower's motion for summary judgment *sua sponte* holding as a matter of law that Rodrian was at fault.

On September 30, 1998, following discovery by both parties, Tower stipulated to reform Trinity's policy to include non-owned coverage at the time of the accident. Meanwhile, Tower had not only provided Trinity a defense (and paid for defense costs on behalf of Trinity), but also paid approximately $490,000 to discharge Trinity's liability in its entirety in the underlying lawsuit. Trinity further demanded reimbursement for its attorney's fees in the reformation action; Tower refused. After Tower's refusal, Trinity amended its complaint to include an action for bad faith.

On April 14, 1999, Tower moved for summary judgment on Trinity's bad faith claim. Armed with the favorable summary judgment ruling against Rodrian, Tower argued that its initial denial of coverage was proper until Trinity sought reformation of the contract and met its burden of proof.[1] Wisconsin courts had never before recognized bad faith in a reformation context; therefore, Tower explained, it had a reasonable basis for denying coverage until reformation was

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[1] Tower also argued that it could not have acted in bad faith where it had followed established Wisconsin procedures for handling a reformation claim in the face of agent error.

requested and proven. Tower further argued that Rodrian's mistake caused the coverage lapse, and, therefore, Rodrian and Utica were liable.

In response, Trinity argued that there was "ample evidence" precluding Tower's motion for summary judgment and that the issue for the jury to decide was: "the question of whether [T]ower breached its fiduciary duty of good faith should be left to the jury." Trinity also argued that Tower denied reformation without adequate investigation following Rodrian's request for back-dated coverage.

On July 21, 1999, Judge Marianne Becker granted summary judgment *sua sponte* in favor of Trinity, the non-movant. Pet. App. 65a-74a. Finding that a mutual mistake occurred, Judge Becker explained that non-owned coverage legally existed when the policy was put into place. Pet. App. 67a-69a. Judge Becker ruled that Tower acted in bad faith because it did not have a reasonable basis for denying reformation. Pet. App. 69a-72a. She awarded compensatory damages to Trinity in the amount of $17,570, the cost of attorney's fees incurred by Trinity. Pet. App. 72a-74a. Tower twice moved for reconsideration and separately sought leave to appeal Judge Becker's order; all were denied.

Punitive Damages Trial

The trial, solely on the matter of punitive damages, was held before Judge Donald J. Hassin and a jury on December 19-21, 2000. Due to the *sua sponte* bad faith finding, the jury was repeatedly instructed that Tower's behavior in this case was unreasonable and amounted to bad faith as a matter of law. This bad faith instruction precluded Tower's ability to present expert testimony on whether or not it committed bad faith. Moreover, throughout the three-day trial, Trinity's attorneys repeatedly

argued for punitive damages based on the court's finding that Tower had committed bad faith.

The jury returned a verdict in favor of the church four days before Christmas for $3.5 million in punitive damages as compared to the previous award of $17,750 in compensatory damages. Following post trial proceedings (Pet. App. 77a-115a), Tower filed its appeal.

Appellate Court Decision

The Appellate Court issued its decision in Tower's appeal on January 30, 2002. Pet. App. 46a-64a. The Appellate Court reversed the summary judgment decision in favor of Trinity on the issue of bad faith. Pet. App. 54a. The Appellate Court concluded that the trial court erred in granting summary judgment in favor of Trinity in light of Trinity's own admission below that there were disputed issues of fact. The Appellate Court explained: "We agree with the parties that the facts related to what Tower actually knew and thus whether there was intentional disregard are in dispute. We therefore find that there were material facts in dispute, making summary judgment inappropriate." Pet. App. 55a. Therefore, the Appellate Court reversed the summary judgment ruling and remanded the case for a jury trial on the issue of bad faith. Pet. App. 58a.

Nonetheless, rather than remanding the punitive damages award to the trial court for a jury trial along with the underlying bad faith claim, the Appellate Court upheld the punitive damages award "*if* on remand the jury finds bad faith." Pet. App. 58a (emphasis in original). The Appellate Court attempted to explain its inconsistent holding:

> We recognize that in order to discuss our decision to uphold the punitive damages award we must assume arguendo that bad faith was prop-

> erly found. Our analysis will reflect the assumption that bad faith exists. However, if the jury *does not* find bad faith, the punitive damages award is nullified.

Pet. App. 58a. The Appellate Court commented that Trinity supplied credible evidence to show that Tower acted in an intentional disregard of Trinity's rights; the Appellate Court explained that this showing was enough to support the submission of punitive damages to the jury. Pet. App. 59a. The Appellate Court found that the $3.5 million award did not violate Wisconsin's legitimate interests in deterrence and punishment. Pet. App. 61a. The Appellate Court concluded that the jury's punitive damage award passed muster under constitutional due process analysis. Pet. App. 60a-64a. Following the Appellate Court's decision, both Tower and Trinity filed petitions for review with the Wisconsin Supreme Court.

Supreme Court Decision

In a 6-3 split decision, the Wisconsin Supreme Court reversed the decision of the Wisconsin Court of Appeals and reinstated the *sua sponte* summary judgment decision. Pet. App. 1a-45a. The Wisconsin Supreme Court held that, based on the facts of the case, Tower had acted with bad faith toward Trinity. Pet. App. 9a. The Wisconsin Supreme Court explained that the undisputed material facts showed that Tower acted with a knowledge or a reckless disregard of the lack of a reasonable basis for denying Trinity's claim. Pet. App. 12a-13a. Therefore, the Wisconsin Supreme Court reinstated the trial court's summary judgment on bad faith.

The Wisconsin Supreme Court also upheld the validity of the $3.5 million punitive damages award. Pet. App. 13a. The Wisconsin Supreme Court, applying the "factors most

relevant in this case," determined that the punitive damages award was not grossly excessive and did not violate due process constraints. Pet. App. 26a-27a. The Wisconsin Supreme Court acknowledged that *de novo* review was appropriate and that the due process clause of the Fourteenth Amendment to the United States Constitution imposed substantive limits on the size of punitive damages awards. Pet. App. 17a. Nonetheless, purporting to apply the guideposts enunciated by this Court,[2] the Wisconsin Supreme Court determined that Tower's behavior was egregious and that the ratio of punitive damages to compensatory damages was 7 to 1, not the 200 to 1 ratio that Tower alleged. Pet. App. 20a-24a. Finally, the Wisconsin Supreme Court found that the comparison of the punitive damages to the civil or criminal penalties that could be imposed for comparable misconduct had "less utility" when used to determine the dollar amount of a punitive damages award. Pet. App. 24a-25a.[3] Thus, the Wisconsin Supreme Court reinstated the bad faith summary judgment decision and upheld the $3.5 million punitive damages award. The Wisconsin Supreme Court denied Tower's motion for reconsideration on July 1, 2003. Pet. App. 75a-76a.

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2 "The test asks the reviewing court to weigh: (1) the degree of egregiousness or reprehensibility of the conduct; (2) the disparity between the harm or the potential harm suffered and the punitive damages award; and (3) the difference between the punitive damages and the possible civil or criminal penalties imposed for the conduct." Pet. App. 18a (citing *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996); *State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. __, 123 S. Ct, 1513 (2003)).

3 Wisconsin Supreme Court Justices David T. Prosser, Jr., Diane S. Sykes and Jon P. Wilcox dissented.

REASONS FOR GRANTING THE WRIT

The Wisconsin Supreme Court's decision to reinstate the punitive damages award of more than 200 times the compensatory damages and 350 times the relevant regulatory sanction is based upon a misapplication of this Court's recent seminal decision in *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. __, 123 S. Ct. 1513 (2003). *Campbell* was not, as the Wisconsin Supreme Court suggests, a mere application or refinement of the principles enunciated by the Court in *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 583 (1996). Rather, *Campbell* was a sea change in the law of punitive damages; *Campbell* announced new standards requiring more rigorous review by state and federal courts.[4]

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[4] Following the *Campbell* decision, this Court has vacated several punitive damages awards and remanded the cases for further reconsideration. *See, e.g., Romo v. Ford Motor Co.*, 122 Cal. Rptr. 2d 139 (Cal. Ct. App. 2002), *vacated by* 123 S. Ct. 2072 (2003) (mem.); *Sand Hill Energy, Inc. v. Ford Motor Co.*, 83 S.W.3d 483 (Ky. 2002), *vacated sub nom. Ford Motor Co. v. Smith*, 123 S. Ct. 2072 (2003) (mem.); *Textron Fin. Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh*, 2002 Cal. App. Unpub. LEXIS 6131 (Cal. Ct. App. June 28, 2002), *vacated by* 123 S. Ct. 1783 (2003) (mem.); *Rhone-Poulenc Agro. S.A. v. DeKalb Genetics Corp.*, 272 F.3d 1335 (Fed. Cir. 2001), *vacated sub nom. DeKalb Genetics Corp. v. Bayer CropScience, S.A.*, 123 S. Ct. 1828 (2003) (mem.); *Simon v. San Paulo U.S. Holding Co.*, 2001 Cal. App. Unpub. LEXIS 1860 (Cal. Ct. App. Nov. 7, 2001), vacated by 123 S. Ct. 1828 (2003) (mem.); *Bocci v. Key Pharms., Inc.*, 35 P.3d 1106 (Or. Ct. App. 2001), *vacated sub nom. Key Pharms., Inc. v. Edwards*, 123 S. Ct. 1781 (2003) (mem.); *Waddill v. Anchor Hocking, Inc.*, 27 P.3d 1092 (Or. Ct. App. 2001), *vacated by* 123 S. Ct. 1781 (2003). That action would not have been necessary if *Campbell* had not

(continued...)

If *Campbell* is to have its intended effect, state and federal courts must understand fully its scope and meaning. Granting review in this case – even for the purpose of summarily reversing – would guide courts throughout the country as to *Campbell's* significance in analyzing punitive damages awards.

I. THIS COURT SHOULD GRANT THE WRIT IN ORDER TO CORRECT THE WISCONSIN SUPREME COURT'S MISAPPLICATION OF *CAMPBELL*

This Court should grant the writ of certiorari in this case in order to provide state and federal courts with a further clarification of the *Campbell* decision. This Court's decision in *Campbell*, which came down just weeks before the Wisconsin Supreme Court's ruling, set new ground rules for the constitutionality of punitive damages awards. Of particular import to this matter, this Court (i) held that a punitive damages award must be reasonably related in amount to the relevant criminal or regulatory sanction for similar conduct; (ii) held that a punitive damages award more than ten times the actual compensatory damages was almost never appropriate; and (iii) reaffirmed that punitive damages were generally not appropriate where the plaintiff suffered only economic injury. The Wisconsin Supreme Court's opinion either ignores or misapplies each of these holdings.

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[4] (...continued)
changed the law.

A. Campbell Holds That The Punitive Damages Award Must Comport With The $10,000 Regulatory Sanction For Similar Conduct

In *Campbell* this Court held that state courts must compare punitive damages awards to the relevant criminal or regulatory sanction for the same conduct. *Campbell*, 123 S. Ct. at 1526. The *Campbell* Court did not hold, as the Wisconsin Supreme Court suggests, that this factor was unimportant. To the contrary, this Court found it dispositive.

Specifically, *Campbell* held that the relationship between the punitive damages and the $10,000 regulatory fine for insurance claims practices was excessive. The *Campbell* Court stated: "The most relevant civil sanction under Utah state law for the wrong done to the Campbells appears to be a $10,000 fine for an act of fraud – an amount dwarfed by the $145 million punitive damages award." *Id.* (citation omitted). Similarly, $10,000 is the maximum penalty that the Wisconsin Insurance Commissioner may levy pursuant to Wis. Stat. § 601.64(4). That $10,000 maximum penalty is "dwarfed" by the $3.5 million punitive damages award levied against Tower. Under *Campbell*, this ends the analysis, and the judgment against Tower cannot stand.

Justice Diane S. Sykes' dissent properly critiques the majority opinion's tacit agreement with the Appellate Court's analysis that this factor was "largely irrelevant." Pet. App. 42a-43a. Before *Campbell*, a court may have said that; now it may not. As Justice Sykes states, Wis. Stat. § 601.64(4) "proscribe[s] conduct that is comparable to the tort of bad faith. The $3.5 million punitive damages award in this case, evaluated against the $10,000 maximum fine provided for in Wis. Stat. § 601.64(4), yields a 350:1 ratio, even more startling than the 200:1 ratio for punitive-to-compensatory damages." Pet. App.

43a. For this reason alone, the petition for a writ of certiorari should be granted and the judgment below reversed.

B. *Campbell* Holds That Punitive Damages Greater Than Ten Times Actual Damages Typically Cannot Stand

The Wisconsin Supreme Court overlooked a second change effected by *Campbell*: this Court's *Campbell* analysis moved away from a focus on "potential" compensatory damages toward an analysis of the ratio between punitive damages and actual compensatory damages. This Court explained that a punitive award greater than ten times actual compensatory damages rarely comports with due process. *Campbell*, 123 S. Ct. at 1524. "Our jurisprudence and the principles it has now established demonstrate, however, that, in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." *Id.* This Court then stated: "They [the ratios] demonstrate what should be obvious: Single-digit multipliers are more likely to comport with due process, while still achieving the State's goals of deterrence and retribution, than awards with ratios in the range of 500 to 1, or, in this case, of 145 to 1." *Id.* (citation omitted).

This holding is important for two reasons. First, both parties stipulated that the actual damages in this case were only $17,570. Thus, the ratio of punitive damages to actual damages is 200:1, far in excess of the 10:1 maximum generally permitted under *Campbell*. In fact, the 200:1 ratio at issue here is even larger than the 145:1 ratio this Court struck down as unconstitutional in *Campbell*.

Second, the Wisconsin Supreme Court opinion incorrectly focused on Trinity's fictitious theory of "potential" compensatory damages. The Wisconsin Supreme Court incorrectly accepts Trinity's argument that the underlying compensatory damages in this case are $490,000 rather than the $17,570 to

which Trinity stipulated in the trial court. As Justice Sykes explains, "[i]nexplicably, the [Wisconsin Supreme Court] fails to undertake the proper comparison (punitive damages to actual compensatory damages) and instead endorses (apparently) an improper comparison of punitive damages to a measure of 'potential harm' that has no relationship to the bad faith claim upon which the punitive damages award was premised." Pet. App. 41a. The 200:1 ratio cannot stand.

C. Trinity Suffered Purely Economic Losses

The Wisconsin Supreme Court also misapplied the standards for reprehensibility analysis under *Campbell* by overlooking the fact that Trinity suffered only economic harm.

> We have instructed courts to determine the reprehensibility of a defendant by considering whether: the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident. The existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect.

Campbell, 123 S. Ct. at 1521 (citation omitted). This Court's reprehensibility analysis under the *BMW* factors required the Wisconsin Supreme Court to take into account the type of harm Trinity suffered.

Here the alleged harm to Trinity is remarkably similar to that described in *Campbell*:

> The harm arose from a transaction in the economic realm, not from some physical assault or trauma; there were no physical injuries; and State Farm paid the excess verdict before the complaint was filed, so the Campbells suffered only minor economic injuries for the 18-month period in which State Farm refused to resolve the claim against them.

Id. at 1524-25. Tower provided a defense to Trinity in the underlying lawsuit. While providing that defense, Tower filed a declaratory judgment action to determine which insurer was liable, and Tower voluntarily reformed the policy and paid $490,000 to settle the underlying claim. The only damages suffered by Trinity were the legal fees incurred in establishing coverage. Those minimal economic losses over a disputed issue do not warrant the $3,500,000 awarded in this case.

The Wisconsin Supreme Court relied on Trinity's mischaracterization of Tower as a recidivist based on *Trible v. Tower Insurance Co.*, 43 Wis. 2d 172, 168 N.W.2d 148 (1969), in its reprehensibility analysis. Pet. App. 21a. However, as Justice Sykes' dissent correctly points out:

> By no stretch of the facts or imagination can Tower be considered a "recidivist" on the basis of *Trible*.
>
> In *Trible*, this court held that an insurance agency's mistake is attributable to the insurer under agency law, and that reformation is an appropriate remedy for mutual mistake in an application for insurance. . . . Contrary to the majority's assertions, then, *Trible* did not hold that Tower had violated any duty, disregarded any law, or otherwise committed bad faith

> against its insured. Tower can hardly be considered a "repeat offender" on the basis of *Trible*.

Pet. App. 39a (citation omitted).

In *Campbell* this Court explained that "[a]lthough [we hold] 'that a recidivist may be punished more severely than a first offender' . . . in the context of civil actions courts must ensure the conduct in question replicates the prior transgressions." 123 S. Ct. at 1523 (citation omitted). Here the Wisconsin Supreme Court failed to heed this Court's warning. As a result, Tower has been wrongly punished today for dissimilar actions in a case that occurred decades ago.[5]

The Wisconsin Supreme Court's failure to recognize that the only possible harm Trinity suffered was purely economic in nature, coupled with its misapplication of the *Trible* decision, confirms that this Court should grant the writ of certiorari in this case and reverse the judgment below.

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[5] Furthermore, under *Campbell*, "[t]he reprehensibility guidepost does not permit courts to expand the scope of the case so that a defendant may be punished for any malfeasance, which in this case extended for a 20-year period." *Campbell*, 123 S. Ct. at 1524. In this case, the Court has extended the scope of Tower's punishment over a thirty-year period.

CONCLUSION

For the reasons set forth above, Tower respectfully requests that this Court grant the petition for a writ of certiorari.

Respectfully Submitted,

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